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NO. 87-1523

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1987

ROBERT C. MORRIS,
*Petitioner*

COOPER STEVEDORING CO., INC., and
INSURANCE COMPANY OF NORTH AMERICA,
*Intervenors*

v.

COMPAGNIE MARITIME DES CHARGEURS
REUNIS, S.A.,
*Respondent*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED FOR REVIEW

I.

Did the Appellate Court render a decision in conflict with the decisions of a Federal Court, or a State Court of last resort on the same matter by holding that the evidence did not support a finding of negligence?

II.

Did the Appellate Court decide an important question of federal law, which has not been, but should be, settled by this Court, or decided by Federal Court in a way in conflict with the appellate decisions of this Court? In other words, did the Appellate Court misapply the principles announced by this Honorable Court in *Scindia Steam Navigation Co. v. De Los Santos,* 451 U.S. 156 (1981)?

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## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## STATEMENT OF THE CASE

Petitioner's Statement of the Case is materially inaccurate. Petitioner longshoreman was injured when a straight aluminum ten foot ladder fell with him while he was descending from the top of a container eight feet off the deck. He was not being "rushed" as Petitioner claims. This is one of the findings that the Fifth Circuit

Court of Appeals held to be clearly erroneous. But the important "error" in Petitioner's Statement of the Case pertains to how he came by the ladder in question. He claims that there was evidence that the ladder was given to him by a ship's crewman. There was absolutely no such evidence.

Plaintiff pleaded through six Amended Complaints and a Pre-Trial Order that his walking foreman gave him the ladder and forced him to use it over his protest. He swore this on deposition, and on trial, never materially varying his claim. His walking foreman testified that he gave no ladder to Petitioner, but in fact, instructed him not to use any ladder. Despite this, the Trial Court made no finding as to how Plaintiff came by this ladder, stating on this vital issue only that how the Plaintiff came by the ladder is "unclear".

## ARGUMENT

In his questions presented, and in his "reasons for granting the writ", Petitioner charges the Appellate Court with violating the principles of *Scindia, supra,* and rendering a decision that conflicts with cases in other circuits.

In fact, the Fifth Circuit merely applied *Scindia* in holding that the evidence failed to support all of the findings by the Trial Court, and that the evidence did not support the Trial Court's conclusion of negligence.

The evidence was undisputed that the longshoremen were not using ladders on the day of this accident, but were using the spreader bars operated by the Pacceco crane to ascend the container tops in order to set plugs. The walking foreman had given orders *not* to use ladders. It is undisputed that the ladder in question was only used

this one time. It was the duty of the stevedore to furnish safe ladders. The Occupational Safety and Health Administration, 29 C.F.R. § 1918.25, provides as follows:

> "1918.25 Ladders . . .
>
> (e) When necessary to obtain access to and from a stowed deck load or other cargo and no other safe means is available ladders or steps of adequate strength, and positively secured against shifting or slipping, shall be furnished . . ."

The local Marine Safety Rules provided:

> "20. Portable Ladder: where it is necessary to use a hand ladder, the foreman shall see that such ladder is safe."

Applying *Scindia,* the Appellate Court simply held that there was no evidence that the shipowner did not inspect the ladder and thus no evidence of negligence in view of the Trial Court's finding that the ship neither knew the condition of the ladder nor that Petitioner was using it. Trial Court Finding of Fact Number 22. The shipowner was not negligent, because *"Scindia* entitled the shipowner to rely on an expert and experienced stevedore", acting with "reasonable care." See *Scindia, supra,* P. 175, 176. The Appellate Court held that because "the shipowner has no duty to anticipate the actions or inaction of a careless stevedore, Morris must look to his employer for compensation".

The Fifth Circuit found and held that the District Court's Findings of Fact were inconsistent and contradictory, inadequate to impose liability upon the Defendant. Most importantly the finding of negligence was clearly

erroneous. The ship is entitled to rely on a careful stevedore whose duty it is to supply the ladder and to see that it was safe before permitting its longshoremen to use.

Petitioner cites three cases which he claims to be in conflict with the decision herein.

The first is *Hedrick v. Daiko Shoji Co., Ltd. Osaka,* 715 F.2d 1355 (9th Cir. 1983); 733 F.2d 1335 (9th Cir. 1984 reh.). There the Court held that the defect was such that an inspection could have disclosed it. Here, the Fifth Circuit Court of Appeals held that on the record the Plaintiff failed to present any evidence of failure of inspection or that reasonable inspection would have discovered a defect. Therefore, there is no conflict with *Hedrick*. The two cases turned on different facts.

The second case is that of *Biggs v. Logicon, Inc.*, 663 F.2d 52 (8th Cir. 1981), wherein Petitioner quotes a footnote as his authority for claimed conflict. Actually, the case is four square in agreement with, and in support of, the Fifth Circuit's opinion herein, in holding that the longshoreman failed to present evidence of lack of inspection.

The third case, *Davis v. Hill Engineering, Inc.*, 549 F.2d 314 (5th Cir. 1977), is a Jones Act case which is distinction enough.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Petitioner's Application for Writ of

Certiorari be in all things DENIED, and for such other relief as may appear appropriate.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief of Respondent has been served on the following counsel of record, by mailing copy thereof, first class postage prepaid, this 30 day of March, 1988.

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